Sept. 13/94

IN THE MATTER OF THE COMPLAINT OF CONNIE WIGHT AGAINST THE OFFICE OF THE LEGISLATIVE ASSEMBLY ET AL ALLEGING DISCRIMINATION UNDER THE ONTARIO HUMAN RIGHTS CODE

RE: Preliminary issues related to the hearing.

BEFORE: Loretta Mikus

HEARING DATE: August 23, 1994

APPEARANCES: Ms. Sharon Ffolkes-Abrahams, counsel for the Commission

Mr. William Hayter, counsel for the Respondents

DATE OF DECISION: September 13th, 1994

On March 16, 1987 the Complainant commenced her employment at the Office of the Legislative Assembly in the Legislative Research Service department as a researcher.

During her first year of employment the Complainant became pregnant. From approximately January of 1988 until her delivery on March 10, 1988, the grievor was unable to attend at work due to complications. During that period of time she was denied sick leave benefits and maternity leave benefits.

By complaint dated September 28, 1988, she filed a complaint under the **Ontario Human Right's Code** R.S.O. 1990, c. H-19, alleging discrimination in employment on the basis of sex, family status and handicap. Her complaint involves, in part, issues concerning allegations that the sick leave plan and maternity leave provisions of the Office of the Legislative Assembly discriminate on the basis of sex and are therefore invalid.

On January 6, 1994 I was appointed by the Minister of Citizenship to convene a hearing into this matter. It was agreed amongst the parties that the hearings would commence in September and October of 1994. At the request of the parties, a hearing was scheduled for August 23, 1994 to deal with several preliminary matters prior to those hearing dates.

The first preliminary issue arose from the Commission's motion to include, in the original complaint, a further complaint of harassment in the work place because of sex as set out in Section 7(2) of the **Human Rights Code.**

Mr. Bill Hayter, counsel for the Office of the Legislative Assembly, objected to that motion on the grounds that it would be an abuse of process to add a new complaint at this stage of the proceedings.

As well, Mr. Hayter raised several preliminary matters on behalf of the Office of the Legislative Assembly. The Respondents took the position that Mr. Hugh Edighoffer, in his capacity as speaker, and Head of the Office of the Legislative Assembly and the Board of Internal Economy should be removed as named respondents from the complaint. The second issue arises from the allegation that an employee at the Office of the Legislative Assembly advised the Complainant that she could "bank" her sick leave credits so as to extend her employment beyond the eligibility dates required for maternity leave benefits. The Respondents took the position that, if there was such an agreement, that was a private matter between the Complainant and an employee of the Legislative Assembly. As such, it is not subject to review under the **Human Rights Code.** The Respondents asked for a ruling that the complaint, insofar as it relates to that issue, should be dismissed.

The Respondents also took the position that, since the Commission intended to challenge the validity of the eligibility requirements of the maternity leave provisions at the Office of the Legislative Assembly, it would also be challenging the validity of the **Employment Standard's Act** R.S.O. 1990 c. E.14 and the **Public Service Act** R.S.O. 1990 c. P.47, upon which the benefits available to the employees of the Office of the Legislative Assembly are based and which contain similar eligibility requirements. For that reason, the Respondents

took the position that the Office of the Attorney General ought to be notified that there is a statute under challenge and be given an opportunity to intervene.

Finally, the Respondents took the position that the issue of the denial of sick leave benefits is moot in that the Complainant was paid sick leave benefits from January of 1988 until March 10 of 1988, that is up to her delivery. It was the position of the Respondents that the Commission is attempting to get a ruling that the Legislative Assembly committed an unlawful act based on provisions that, at the time, were legally valid. The Respondents took the position that the complaint, in so far as it alleges discrimination on the basis of the sick leave policy, is moot and, therefore, should be dismissed.

During the hearing the Respondents argued that there had been an excessive delay in processing this complaint and, as a result of that delay, the Respondents have suffered prejudice. At the hearing, Mr. Hayter advised me that the Respondents intended to reserve their right to argue the issue of delay at the conclusion of the inquiry and, therefore, for purposes of this preliminary hearing, did not intend to raise it as a preliminary issue.

As well, during the hearing, Ms. Ffolkes-Abrahams, counsel for the Commission, agreed that, as a matter of caution, she would undertake to provide notice to the Attorney General's office of the potential challenge to the **Employment Standard's Act** and **Public Service Act** so that it might decide whether or not it intended to intervene.

Dealing first with the motion from the Commission, Ms. Ffolkes-Abrahams argued that, according to Section 39 of the **Code**, a Board of Inquiry is required to hold a hearing to determine whether a right of a complainant has been infringed. That requirement is not to determine how a complaint has been framed. In this case, the Complainant has alleged that she was discriminated against on several grounds. The issue of harassment in the workplace because of sex is raised in that initial complaint, although admittedly not expressly. Ms. Ffolkes-Abrahams took the position that, in adding a further ground to the Complainant's allegations, the issue is not whether it should be added but rather how much notice is necessary in circumstances. Ms. Ffolkes-Abrahams advised the Respondents in July of this year that she intended to include an allegation under section 7(2) and the Respondents have had sufficient time to prepare to answer that allegation.

Ms. Ffolkes-Abrahams relied on several cases in support of her position. The first of that is the case of **Cousens v. The Canadian Nurses Association** (1981), 2 C.H.R.R. D/365. In that case, Mr. Cousens had filed a complaint of discrimination on the basis of ancestry when he was dismissed from his job. At the commencement of the hearing, counsel for the Commission sought to add two additional grounds of discrimination, namely, nationality and place of origin. In considering that request, the Board stated that it was required not to simply decide the specific ground of discrimination that had been alleged, but rather to hear the circumstances of the complaint as presented by the parties. Mr. Ratushny stated in paragraph 3255, "the written complaint is not therefore, in the nature of an information or indictment in a criminal case. Rather, it serves as general notice to

a party in an administrative hearing". Acknowledging that the Respondents had received little notice of the additional grounds, he was prepared to grant an adjournment in order to enable counsel to respond. He specifically rejected the argument that only the ground indicated in the written complaint could be decided by him and that another ground of discrimination was a new complaint that could only be considered if the Minister of Labour appointed another Board of Inquiry to deal specifically with that additional ground. He relied on the fact that the **Code** allows a Board of Inquiry to add parties to a complaint prior to and during a hearing. Allowing a Board of Inquiry to add parties but not additional grounds would be anomalous. It was his view that the **Code** was worded sufficiently broadly to bear the practical interpretation that a Board has a jurisdiction to amend the grounds of contravention specified in the complaint.

Similarly in the case of **Styres v. Paiken** (1982), 3 C.H.R.R. D/926, Mr. Hunter allowed an application to amend a complaint on the grounds that the complaint form clearly disclosed the case the Respondent had to meet and he was not prejudiced in preparing his defence.

In the case of **Sinclair v. Peel Non-Profit Housing Corporation** (1990), 11 C.H.R.R. D/341, the Board of Inquiry was asked to add an additional ground to the allegations. Approximately one year after the original complaint was filed, the Complainant's counsel requested that the complaint be expanded to include sex as a contravened ground. Mr. Friedland stated that there was no doubt in his mind that a Board of Inquiry had jurisdiction to amend a complaint and, in paragraph 10, stated:

> It would be a mistake for Boards of Inquiry to be bogged down in procedural rules. It is unfair to the Complainant and inconsistent with the spirit of The Code. If an amendment is not made, then a further Inquiry to decide this issue would be required. Multiplicity of proceedings is not desirable. Respondents, however, have to be treated fairly. They have a lot at stake in the process.

He went on to allow the additional ground, reasoning that the Respondents had known about it for a six-month period and that the additional ground arose out of the original fact situation. He was, however, prepared to allow additional time for the Respondents to prepare an answer to that additional ground.

Ms. Ffolkes-Abrahams argued that the same situation applies in this complaint. Throughout the complaint there has been an inference that the Complainant felt she was being harassed for continuing to seek maternity and sick leave benefits. Ms. Ffolkes-Abrahams argued that the fact situation giving rise to the original complaint is the same fact situation giving rise to the allegation of harassment in the work place because of sex. The Respondents have had notice of this additional ground and have all the material before them they will need in order to answer that allegation. Therefore, argued Ms. Ffolkes-Abrahams, there is no prejudice to the Respondents.

As further support for her motion, Ms. Ffolkes-Abrahams referred to the cases of **Tabar and Lee v. David Scott and West End Construction Limited** (1982), 3 C.H.H.R. D/1073, **Bremer and the Board of School Trustees, School District No. 62 (SOOKE) and Pullinger** (June 10, 1977), unreported (Rod German) and **Anthony Wong v. The Ottawa Board of Education and Wotherspoon** (October 18, 1993) unreported (H.A. Hubbard) which stand for the proposition that a Board of Inquiry has authority to add complaints up to and

during the hearing and, in fact, has the jurisdiction to raise those additional complaints itself.

It was Ms. Ffolkes-Abrahams's submission that the case law is settled and that a Board of Inquiry has jurisdiction to amend a complaint so long as the Respondents are not prejudiced and have adequate opportunity to respond to the additional complaint.

Mr. Hayter took the position that a Board of Inquiry has no jurisdiction to entertain a new complaint that was not subject to the statutory scheme set out in the **Code** for the processing of complaints. In the alternative, he argued, if a Board of Inquiry does accept the argument that it has jurisdiction to amend a complaint, it also has discretion under the **Statutory Powers and Procedures Act** R.S.O. 1990 c. S.22 to prevent an amendment to a complaint that would result in an abuse of process.

Mr. Hayter relied on sections 32 (1) and 33 of the **Code** which read as follows:

> 32 (1) Where a person believes that a right of the person under this Act has been infringed, the person may file with the Commission a complaint in a form approved by the Commission.
>
> (2) The Commission may initiate a complaint by itself or at the request of any person.
>
> (3) Where two or more complaints,
>
> (a) bring into question a practice of infringement engaged in by the same person; or
> (b) have questions of fact or law in common, the Commission may combine the complaints and deal with them in the same proceeding.
>
> 33 (1) Subject to section 34, the Commission shall investigate a complaint and endeavour to effect a settlement.

> (2) An investigation by the Commission may be made by a member or employee of the Commission who is authorized by the Commission for the purpose...

Mr. Hayter argued that section 33 places a positive obligation on the Commission to investigate a complaint and to attempt to effect a settlement during those investigations. For that purpose the Commission has been granted wide investigatory powers that are intended to allow them to determine whether a complaint has enough merit to warrant a hearing. Section 34(1)(d) of the **Code** gives the Commission the authority to refuse to proceed with a complaint that arose more than six months before the complaint was filed. Mr. Hayter argued that timeliness protection is significant in that it gives the Commission discretion to determine whether the delay in filing the complaint should be sufficient cause not to proceed. This protection in the **Code** is intended to give the Respondents relief from frivolous, vexatious or untimely complaints. Section 17(4) of the **Code** confirms that the jurisdiction of the Commission is exhausted once the complaint has been forwarded to a Board of Inquiry. The Board of Inquiry is then required to determine whether a right has been infringed. The "right" referred to is the same "right" found in section 32, that is the right articulated in the original complaint.

It was Mr. Hayter's submission that the statutory framework for the processing of a complaint is specific and mandatory. To the extent that the Commission wants to add a new and substantive ground to that complaint, it is contrary to the procedures set out in the **Code**. In particular, this new complaint was never processed through the investigatory or mediation aspects of the Commission's process. An alleged violation under the **Code**, argued Mr. Hayter, cannot be forwarded to a Board of Inquiry until it has been properly

processed through the mandatory scheme set out in the **Code**. Otherwise, the Respondents will have been deprived of the benefit of the protection set out in the **Code**. The Respondents have a right to expect the same thorough investigation and mediation attempts for this complaint that the original complaint was subject to. Otherwise, argued Mr. Hayter, the Commission could be forever amending and altering the original complaint and expanding the grounds upon which the original complaint was filed.

On that basis, argued Mr. Hayter, the new complaint of harassment is either untimely or has never been processed properly as required by the **Code**. For those reasons, Mr. Hayter argued that a Board of Inquiry would be acting in excess of its jurisdiction if it allowed the Commission to amend the complaint.

In support of his position, Mr. Hayter referred to the case of **Findlay and MacKay v. Mike's Smoke and Gifts et al**, (October 22, 1993), unreported (Ontario Board of Inquiry). In that case the complaint was dismissed because there had been no attempts made by the Commission to settle the matter. The requirement to attempt to settle the matter was found to be a condition precedent and a failure to comply with that condition precedent rendered the appointment of the Board of Inquiry invalid. As well he relied on the case of **Naraine v. Ford Motor Company of Canada Ltd. et al** (April 12, 1994), unreported (Ontario Board of Inquiry) and **Prudential Insurance Co. of America and Ontario Human Right's Commission** (endorsement, Ontario Divisional Court, November 15, 1989) and **Attorney General of Canada v. Canadian Human Rights Commission et al** (1991) 36

C.C.E.L. 83.

In the **Attorney General** case (**supra**), the Complainant had been terminated from her position of social development officer in 1985. The grounds for the termination were incompetence. She appealed to the Public Service Commission Appeal Board and, at the same time, filed a complaint with the Canadian Human Rights Commission alleging discrimination on the basis of race. The Commission postponed dealing with that complaint pending the decision of the Public Service Commission Appeal Board. That decision was released in March of 1986 and it dismissed the appeal and upheld the recommendation that she be terminated. Although the Public Service Commission Appeal Board did address the issue of racial discrimination, the focus of its decision were the allegations of incompetence. In November of 1986 the Commission decided not to deal with her complaint of discrimination because it had been dealt with by the Public Service Commission Appeal Board. The Complainant challenged that refusal and in, September of 1987, the Federal Court of Appeal ruled that the Commission had to proceed with the complaint. The Commission appointed an investigator the following April and the investigator's report recommended that a Human Rights Tribunal be appointed to inquire into the complaint. Based on the investigator's findings, the Complainant amended her complaint to alleged sexual harassment. The Applicants applied to quash the decision to appoint a tribunal and a prohibition against any proceedings.

The Court found that the Commission had acted improperly or illegally in allowing the

complaint to be amended in such a fashion. It noted, in paragraph 26, "it is not too technical to expect the Commission to abide by the laws and provisions in fairness to the person or the body against which any complaint is lodged". In considering the Commission's obligation to appoint an investigator, the Court determined that meant the investigator was to investigate an existing complaint. It stated that the investigator should have proceeded on the basis of a complaint which was known and was to be investigated. The investigator was not, it stated "to go about dredging up complaints which have not yet been articulated by a Complainant". It went on to say, in paragraph 27:

> Since the investigator is not empowered to go about dredging up complaints not articulated by the Complainant, the complaint to which the report relates means an already articulated complaint under the C.H.R.A.

In considering the criteria of a year's limitation within which to file a complaint, the Court stated that it "did so in order seriously to confer a benefit and not just to complicate the C.H.R.A..." and that it "appears to be of direct benefit to a Respondent employer". It then went on to state, in paragraph 43, the following:

> The consequence of the Commission's error in law, its failure to exercise its power, resulting in its loss of jurisdiction regarding the late filed complaint of sexual harassment--is acting unfairly and contrary to law in this regard must be exactly that which the Attorney General for Canada seeks in the Notice of Motion by which these proceedings were instituted on behalf of the Employer.

It went on to quash the decision of the Canadian Human Rights Commission to request the appointment of the tribunal.

Mr. Hayter took the position that the Respondents in this case have a right to know specifically the allegations made against them. Adding a complaint at this stage of the proceeding would deprive them of their rights in that regard and, therefore, this Board should not grant the Commission's motion.

With respect to the **Cousens** case (**supra**), Mr. Hayter took the position that it is simply wrong. First, he argued that the argument that the Board of Inquiry would be acting in excess of its jurisdiction if it allowed a complaint to proceed to hearing without having been processed through the statutory scheme was not considered by the Board in the **Cousens** case. As well, Mr. Hayter argued that the Board in that case misconstrued the provisions of the **Code**. Section 39 requires that a Board of Inquiry hold a hearing to determine whether a right has been infringed. The "right" referred to in Section 39 is the same right referred to in Section 32 of the **Code**. That original complaint defines the issues that are to go before a Board of Inquiry. Section 39(3) allows the Board of Inquiry to add a party to the proceedings at any stage of the proceedings and upon such terms as it considers proper. The Board, in the **Cousens** case, determined that, if it had the authority to add a party at any stage of the proceedings, it must, therefore, have the right to amend a complaint. Mr. Hayter took the position that because the **Code** specifically allows a Board of Inquiry to add a party at any stage of the proceedings, its failure to give a Board of Inquiry explicit authority to add a new complaint at any stage of the proceeding is evidence of its intention.

In the alternative, argued Mr. Hayter, if this Board should accept that it has the jurisdiction to amend a complaint, it should refuse to do so on the grounds that it would be an abuse of process. The Respondents did not investigate the allegation of harassment in the workplace based on sex raised in the amendment. It was not included in the original complaint and the Respondents made no efforts to investigate that allegation. A complaint

under section 7(2) of the **Code** is separate and distinct from the complaints and allegations raised in the original complaint. The Respondents have been prejudiced by the delay in raising this additional complaint. It would be an abuse of process to require them to answer to that allegation at this stage.

In the further alternative, Mr. Hayter argued that if the Board was inclined to allow the amendment to the complaint, the Respondents would be seeking an order for particulars identifying, with precision, the scope of the allegations. The Commission has taken the position that the facts giving rise to the allegation are to be found in the original complaint. The Respondents requested an order that the portions of the complaint that the Commission will be referring to be disclosed prior to the hearing.

Based on the submissions of the parties, I am of the view that the motion of the Commission should be granted. The facts giving rise to the allegations of harassment based on sex (i.e. gender) are the same facts that give rise to the original complaint. The parties involved in the original complaint are the same parties involved in the complaint of harassment for sex under Section 7(2). Broadly speaking, the Complainant has alleged that her right to be free of discrimination in the workplace due to her pregnancy was infringed. The allegations of harassment for sex are sufficiently subsumed by the original complaint to persuade me that the amendment should be allowed.

Once a Board of Inquiry is established, it is required, by statute, to determine if a right of

the complainant has been infringed. I cannot accept Mr. Hayter's argument that the Board is restricted to inquiring into the specific allegations raised in the complaint. The written complaint is not similar to the pleadings or information in a civil or criminal proceeding. There is no process of discovery prior to the hearing. If it was intended that a Board of Inquiry be restricted to the actual and precise allegations set out in the complaint, the legislature would have taken steps to insure that all of the procedural safeguards present in the court proceeding would apply as well. It did not because it intended the Board to hear the matter **de novo.** If the legislature intended to restrict the inquiry to the allegations in the original complaint, it could have expressly stated so when drafting section 39. It did not state that the Board of Inquiry was to determine whether the right claimed in the complaint had been infringed. It framed section 39 broadly, in my view, because it intended to give a Board of Inquiry the authority to determine, based on the facts before it, whether a protected right had been infringed. If, during a hearing, it became clear that a right, other than the one articulated in the hearing, had been infringed, it would be inconsistent with the aims of the **Code** and the obligation of the Board, to ignore that infringement simply because it was not part of the original complaint. It would make no sense to refuse to allow the amendment if the result is that another hearing requiring the attendance of the same parties and the tendering of the same evidence would be required.

A Board of Inquiry is charged with the responsibility of determining whether a right has been infringed. That includes a finding of discrimination on any prohibited ground, not

simply the one specified in the original complaint. Mr. Hayter has suggested that the "right" referred to in Section 39 should be read in conjunction with Section 32 so that a restrictive and technical reading of the two would result. I disagree. If that were the case, the **Code** would have been drafted to insure that "**the** right of the complainant" instead of "**a** right of the complainant" would be the subject of the hearing. The authority to amend a complaint is a matter of discretion for a Board of Inquiry. Each case must be considered on its own merits and must involve a balancing of the interests of the parties consistent with the purpose of the **Code.**

For that reason, the **Attorney General of Canada** case (**supra**) is distinguishable from the facts before me. In that case, the new ground the Commission was attempting to add was totally unrelated to the original ground. The fact situation giving rise to the claim of racial discrimination would have, no doubt, been different than the fact situations giving rise to the claim of sexual harassment. It is understandable that the Court found the Commission's failure to process the complaint through its investigatory scheme resulted in unfairness to the Respondents. None of the allegations raised in the new complaint had ever been dealt with during the investigatory process. In this case, the parties have been aware since the filing of the complaint that the right the Complainant was alleging had been infringed was her right to be free from discrimination on the basis of sex. The addition of the allegation that she suffered harassment because of her gender, arises from the identical fact situation that will be dealt with in the original complaint and, therefore, I do not accept the Respondent's argument that they have suffered prejudice in that

regard.

Therefore, the motion to amend the complaint is granted. The Commission will advise the Respondent of the allegations sufficient to allow the Respondents to know the case it has to meet.

The Respondents have asked for an order from the Board deleting the Speaker of the Office of the Legislative Assembly and the Board of Internal Economy as named Respondents in the complaint. Mr. Hayter took the position that, with respect to the issue of the inclusion of the Speaker, as Head of the Office of the Legislative Assembly, he was the person who denied the Complainant maternity leave. As far as he understands there are no specific allegations against the Speaker and, in that regard, he was only acting within his capacity as Head of the Office. It is sufficient that the Office of the Legislative Assembly be the named Respondent.

Ms. Ffolkes-Abrahams conceded that the Commission would be prepared to withdraw Mr. Edighoffer and the Board of Internal Economy from the complaint if the Respondents were prepared to accept responsibility and/or liability for any findings made against them. The Respondents refused to do so.

Since I have decided to grant the Commission's motion to add the complaint of harassment for sex to the original complaint, I am unsure as to whether the allegations will

include Mr. Edighoffer specifically. In any event, given the Respondents' refusal to accept responsibility for any findings against Mr. Edighoffer as Speaker and as Head of the Office of the Legislative Assembly, I am unwilling at this time to remove him as a named Respondent from a complaint. I am of the similar view with respect to the Board of Internal Economy.

The Respondents have argued that the issue with respect to sick leave is moot in that the Complainant received sick pay for the time claimed in the original complaint. Ms. Ffolkes-Abrahams advised the Board that it intended to take the position that the sick leave provisions in general are contrary to the **Code** and that any restrictions on the eligibility of employees for sick leave based on gender should be stricken.

For that reason, the Respondents's motion with respect to this issue is denied.

Finally, the Respondents have argued that, if there was an agreement between the Complainant and an employee of the Office of the Legislative Assembly regarding sick leave benefits, that agreement was a private agreement between the benefits/personnel officer and the Complainant. As such, it was argued, it is not subject to the **Code** and should not properly be placed before a Board of Inquiry. Ms. Ffolkes-Abrahams argued that the issue as to whether or not there was a deal and, if there was, whether the person who advised the grievor that she could bank her sick leave credits are properly before the Board are a matter for evidence and argument. I agree with Ms. Ffolkes-Abrahams

in this regard and, therefore, deny the Respondents's motion.

In summary, therefore, the motion of the Commission to include a complaint of sexual harassment under Section 7(2) of The Code is granted. The motion of the Respondent that the complaint, in so far as it refers to a "deal" with an officer of the Office of the Legislative Assembly, is moot and should be struck from the complaint is denied. The motion of the Respondent that the Speaker of the House and the Board of Internal Economy be removed as named Respondents from the complaint is denied. The Respondent's motion to dismiss the complaint on the basis of delay will be reserved for argument at the conclusion of the hearing.

Finally, Ms. Ffolkes-Abrahams has agreed to inform the Ministry of the Attorney General of the potential challenge to the maternity leave provisions of the **Employment Standards Act** and the **Public Service Act.**

The hearing will convene on the dates agreed to.

Signed this 13th day of September, 1994 in Toronto.

Loretta Mikus

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